THE RIGHT TO LOCAL SELF-GOVERNMENT.

V.

IN Philadelphia *v.* Fox[1] we find the sweeping statement[2] that the city of Philadelphia is a municipal corporation, created by the government for political purposes, and is "merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government — essentially a revocable agency — having no vested right to any of its powers or franchises — the charter or act of erection being in no sense a contract with the state — and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence with the mere breath of arbitrary discretion. *Sic voleo, sic jubeo,* that is all the sovereign authority need say. It will be noticed that the eminent authority delivering this opinion does not lay it down as a principle applicable to all municipal corporations. The learned judge is speaking of the city of Philadelphia only. It would require a critical examination of the constitutional history and development of Pennsylvania before one could pass judgment upon this statement. It would, however, be surprising to find it to be a correct statement of the rights and powers of a division of the state that existed before there was any state or colony.

The question arose upon the validity of an act of the legislature fixing a new board of trustees for the management of the Girard fund, and other funds given in trust for charitable uses to the city of Philadelphia. The first object of inquiry would be as to the provisions made by the donors for the appointment of trustees and of their successors. If provided for by the donors, their directions should be followed. If unprovided for by them, upon general principles, the power to appoint them would reside in the equity court. The question would then arise, has the legislature the power to appoint such trustees, in that respect taking unto itself the power of the equity court? But these questions do not seem to have arisen in the case. If the legislature had such power, it might have it and still the city of Philadelphia might

[1] 64 Penn. St. 169 (1870). [2] See p. 180.

not be so completely dependent upon the will of the legislature as this decision states. If so, then the sweeping statement made of the lack of any and all powers and rights of the city of Philadelphia is *obiter dictum.*

Perkins *v.* Slack:[1] Under an act of the legislature in 1870 certain citizens were constituted commissioners to erect certain public buildings in Philadelphia, with power to make requisitions upon the city council for the necessary funds, the council being required to levy a special tax to raise the amount so required. In 1874 a new state constitution went into effect, limiting any debt or liability by any municipal commission to an appropriation previously made therefor by the municipal government. In 1876 the said commission made a requisition for $1,500,000, and the city council refused to raise the amount. Upon application for mandamus to compel the city council to raise this money, it was held that notwithstanding the new constitution, the council was under obligation to raise the amount required by the commissioners, and that a provision in the new constitution providing that the legislature shall not delegate to any special commission any power to interfere with any municipal improvement is prospective only, and does not apply to special commissions existing before the adoption of this constitution.

The beneficent efforts of the framers of the new constitution to restore to municipalities, to a certain extent, the right to self-government were thus frustrated by this decision.

The dissenting opinion of Paxson, J. (p. 283), must, however, commend itself to the student of constitutional law, and will probably be approved by the bar generally as the better statement of what the law should be. Referring to the scandalous mismanagement of this irresponsible commission, freed by the law from all obligation to the municipality whose money it was squandering, he says: —

"It was known to the convention that the public buildings at Broad and Market streets had been projected upon a scale of magnificence better suited for the capitol of an empire than the municipal buildings of a debt-burdened city; and that the time might come when their further prosecution would become an oppression upon the tax-payers too grievous to be borne, unless the councils, the immediate representatives of the people, should have a power of control over the amount to be annually expended. The result has fully vindicated the wisdom of the convention."[2]

[1] 86 Penn. St. 270 (1878).

[2] See also 1 Hare, Const. Law, 630.

The case of Commonwealth *v.* Plaisted [1] was as follows: A member of the Salvation Army, while playing on a cornet without a license, in a street parade, but without creating any actual disturbance, was arrested and fined, under the provisions of ch. 323, Statutes of 1885. Upon exceptions, the case went to the Supreme Court, and it was there held that this statute, creating a board of police for the city of Boston, to be appointed by the Governor and Council from the two principal political parties, is constitutional, and therefore the fine, under its provisions, was legally imposed. At p. 383 Morton, C. J., says: —

"It is also suggested, though not much insisted on, that the statute of 1885, ch. 323, is unconstitutional, because it takes from the city the power of self-government in matters of internal police. We find no provision of the constitution with which it conflicts, and we cannot declare an act of the Legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the constitution. . . . The powers and duties of all the towns and cities, except so far as they are specifically provided for in the constitution, are created and defined by the legislature, and we have no doubt it has the right in its discretion to change the powers and duties created by itself, and to vest such powers and duties in officers appointed by the Governor, if in its judgment the public good requires this, instead of leaving such officers to be elected by the people, or appointed by the municipal authorities. . . . The Legislature has the right to fix the qualifications of members of the board, and we see no objection to the provision that they shall be appointed from two principal political parties. It is designed to secure, in the action of the board, impartiality and freedom from political bias. It can probably be regarded only as directory to the Governor, and not as an element in the tenure of the office; in either view, it violates no provision of the constitution, and it is for the Legislature to determine whether such a qualification is wise."

Upon examination of the record of the case in the excellent collection of Massachusetts cases in the Social Law Library in Boston, it was found that the Attorney-General in his brief, after considering the act in question, maintained that the defendant was "an itinerant musician," and so within the restrictions of the law forbidding such a one to play on the streets of Boston without a license. Not a word was said as to the rights of towns to local self-government, nor about the questionable legality of a law requiring the members of a police board to be appointed from two political

[1] 148 Mass. 375 (1888).

parties only, nor were any authorities cited on these points. The defendant's brief, among other points, denied that the defendant was an "itinerant musician;" claimed that the rules in question were unreasonable; that they interfered with the exercise of religious rights, etc.; and, finally, that the statute in question is unconstitutional, because "it takes from the city the power of self-government in matters of internal police," . . . etc., citing no authority whatever except Cooley, Const. Lims., 577, and making no objection whatever to the appointment of the members of the board from two political parties only! The Supreme Court of Massachusetts therefore holds any statute constitutional unless it conflicts with some provision of the written constitution, ignoring the unwritten constitution. It holds also that all the powers and duties of towns and cities, unless provided for in the written constitution, are created by the legislature, a conclusion that an examination of the history of the state will not sustain. Lack of space prevents our making an examination of this history, similar to that we have made of the history of Rhode Island, but it is to be hoped that some one versed in the constitutional history and development of the powers, rights, and duties of the towns of Massachusetts will undertake this task. Only a few of its features can here be pointed out, but they are enough to show the incorrectness of this theory.

"A Gen^{r}all Court, holden att Boston, the 19th of Octob^{r}, 1630"
(8 present whose names are given)

"For the establishinge of the goūm^{t}. It was ppounded if it were not the best course that the ffreemen should have the power of chuseing Assistants when there are to be chosen, & the Assistants from amongst themselues to chuse a Goūn^{r} & Deputy Goūn^{r}, whoe wth the Assistants should have the power of makeing lawes & chusing officers to execute the same. This was fully assented vnto by the gen^{p}all vote of the people, & ereccon of hands/." [1]

This was the first time the term "General Court" was used on this side of the ocean, although many of the previous meetings in England had been so entitled. It would seem that hereafter the annual meetings were so called, *i. e.*, the meetings held May 18, 1631,[2] May 9, 1632,[3] May 29, 1633,[4] May 14, 1634,[5] but the next meeting of the General Court was held Sept. 3, 1624, at Newe Towne.[6]

[1] 1 Recs. of Mass., Shurtleff, *62. [2] Ib. *72. [3] Ib. *88.
[4] Ib. *99. [5] Ib. *114. [6] Ib. *122.

At the General Court holden May 14, 1634, we find for the first time, besides the governor, deputy governor, treasurer, etc., three deputies from each of the towns of Newtown, Watertown, Charlestown, Boston, Roxbury, Dorchester, Lynn, and Salem. The list is remarkable, because, according to the dates given in the Manual of the General Court of Massachusetts, Lynn was not incorporated until "Nov. — 1637." How, then, could its representatives attend a General Court in 1634? The list is also remarkable because of the towns that were not present. The absence of representatives from Plymouth, a distinct, separate colony, can be accounted for, but where were the representatives from Medford, incorporated Sept. 28, 1630, according to the Manual?

The former form of oath for the freemen was revoked and a new one was adopted (to support the government of this commonweale and all its liberties and privileges).

It was agreed that none but the General Court has power to choose and admit freemen, nor to make and establish laws, nor to elect officers named "or any of like moment," and to set out their powers, nor to raise money and taxes and to dispose of lands.

Thomas Dudley was chosen governor and Roger Ludlow deputy governor, with nine assistants for one year, and they took the oath of office. It is interesting to note that among the assistants was William Coddington, who was chosen treasurer. He was afterwards banished (under the euphonious designation of "haveing license to depṭ"),[1] and became one of the founders and most prominent men of Rhode Island. His experience in establishing the government of this commonwealth was to stand him in good stead in assisting to frame a government for Newport and Rhode Island, and afterwards in surreptitiously obtaining a charter thereto in England, to himself, his heirs and assigns, to the great annoyance of the good people of Rhode Island.

It was agreed that no trial for life or banishment should be held without a jury. Provision was made that four general courts should meet yearly, the freemen of each town to choose two or three of their number to attend each general court, to make laws, to grant lands, etc., the election of magistrates and other officers only excepted, "wherein eũy freeman is to gyve his owne voyce."

A murder having taken place at Kennebec "by one of the Plymouthe plantacõn," in the presence of John Alden he gave bond with

[1] 1 Mass. Recs. *218.

sureties not to depart out of the limits of this patent without leave from the court or the governor, he being detained "till answer be receaved from those of Plymouthe, whither they will trye the matter there or noe." Provision was made for the enlargement of "Newe Towne" and Boston, and for the annexation of Winetsemut to "Charlton" or Boston. Provision was also made for the common defence, and authority was given to the towns to levy rates on each man "according to his estate & with consideracõn of all other his abilityes."

This necessarily rapid survey is enough to show that the king did not create Massachusetts. He established a trading company which the settlers outgrew and set aside, and replaced with a commonwealth at this session of May 14, 1634. In effect this meeting was in the nature of what we should now call a constitutional convention. Up to this time there was no commonwealth, no central popular government with trial by jury established by law. After the change brought about at this meeting, every man took the oath of allegiance to Massachusetts and not to the king. It meant abrogation of the authority of the king, and to secure it Boston was fortified against him.[1] After this change the freemen created by the charter were required to obtain their freedom from Massachusetts, and henceforth only the new self-instituted commonwealth could make them freemen. John Winthrop was enfranchised May 25, 1636.[2]

The first town or "plantacõn" that we find authorized by the General Court is Concord: "It is ordered that there shallbe a plantacõn at Musketequid, & that there shallbe 6 myles of land square to belong to it . . . & the name of the place is changed, & hereafter to be called Concord."[3] We find also that at this meeting (p. *159), "Ordered that Waymouthe shall have a deputy this court." The towns composing the combination of towns known as Massachusetts that thus authorized the formation of a new town were therefore in existence as separate original towns, before there was any Massachusetts. Therefore Massachusetts did not create them; they created Massachusetts. The Massachusetts cases have contributed largely to the erroneous theory that municipal corporations are merely the creatures of the state legislatures. Dillon, taking the cases as he found them, made the new principle familiar to bench and bar. A faint something, to be sure, was allowed to towns, but cities had no powers unless they

[1] 1 Mass. Recs. *112, 113, 114, 116, 117. [2] Ib. *372. [3] Ib. *157.

were conferred by the legislature. The dogma is simple, but it is not supported by the facts of history.

The denial of corporate powers to towns in Massachusetts seems to have begun in 1816 in. Rumford *v.* Wood.[1] In this case "the inhabitants of the fourth school district in the town of Rumford in the town of Oxford" brought suit against the defendant in assumpsit, for failure to build a schoolhouse, etc., as agreed. The defendant pleaded in abatement that the plaintiffs were not a corporation with power to sue. The plea was rightly overruled, and there the opinion should have stopped. But it went on, after admitting that school districts are not bodies politic and corporate with the general powers of corporations: "The same may be said of towns and other municipal societies, which, although recognized by various statutes and by immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law, are yet deficient in many of the powers incident to the general character of corporations." As the case before the court did not involve the case of a town nor of a town charter, nor of the rights of a town, this was clearly *obiter dictum.* All that the case really decided was that a school district has enough of the character of a corporation to sue. It was correctly cited as an authority to this effect in the opinion of Prout *v.* Fire District in Pittsfield.[2]

Mass. St. 1885, ch. 377, is an act to authorize the city of Boston to take land and to construct thereon a court house for the county of Suffolk, to be paid for by the city of Boston, although as the act states, this court house is "for the use of the courts of the commonwealth in and for the county of Suffolk, and for other purposes incidental thereto." This court house having been completed, in 1894 the General Court passed an act (ch. 453) placing the building in the care, custody, and control of the justices of the Supreme Judicial Court, with authority to appoint and remove, etc., the necessary custodians, whose salaries shall be paid by the city of Boston. No one seems to have called attention to the manifest impropriety and illegality of housing the Supreme Court of the state at the expense of the city of Boston, and in making the city pay the running expenses of this state court house. If the commonwealth has the legal power to saddle the cost and the running expenses of this state court house upon a city, it has equally the right to saddle it or any other expense incurred for the state

[1] 13 Mass. 193.

[2] 154 Mass. 450 (1891).

upon the smallest town in the state. The statute is manifestly unconstitutional. Such is the result of the denial of the right to local self-rule. The glory of Massachusetts as a union of self-governing towns is gone, never to be restored, except by a constitutional amendment or a reversal of the opinion in Commonwealth *v.* Plaisted.

Many years ago the city of Boston built and paid for its own system of water works at an expense of more than twenty-five million dollars, of which amount bonds issued for seven million one hundred and twenty six thousand, one hundred and forty dollars and nineteen cents remain unpaid. Under a statute passed by the General Court,[1] "An Act to provide for a Metropolitan Water Supply," the commonwealth took the supply but left Boston to pay the debt in a peculiar manner, provided in the act. It remains to be seen whether adequate compensation will be made for the property taken from the city. The duty of providing water for Boston and the surrounding towns and cities named in the act (sec. 3) is purely local, yet the governor is to appoint the commissioners, who are to report annually to the General Court, and the treasurer of the commonwealth pays the expenses from the proceeds of bonds authorized to be issued, to be known as the Metropolitan Water Loan. A sinking fund is provided for the ultimate payment of this loan. The cities and towns named, surrounding Boston, are to obtain the benefit of what Boston has bought and paid for, and all are expected to receive new benefits. An enormous new debt is to be created and ultimately to be paid. If the state may thus take upon itself the fulfillment of this purely local duty in this instance, so may it equally take upon itself the fulfillment of any purely local duty in any or all, even the smallest and poorest town in the state, and what has become of the principle of local self-government?

Boston, the home of Samuel Adams, who did so much through the action of the towns to make the Revolution a success, against the attempted exercise of England's power to tax us without representation, is now completely at the mercy of the General Court, and no one protests. Whatever is wanted in Boston, recourse is had to the General Court. Its committees hold long sessions every year for hearings upon laws that relate to the local government of Boston. See the article on "Massachusetts as a Philanthropic Robber," by Charles Warren,[2] for repeated instances of

[1] Acts of Mass. ch. 488 (1895).

[2] 12 HARVARD LAW REVIEW, 316.

the voting away of the money of Boston by the commonwealth's General Court. The state can afford to be generous with the city's money.

More than 750 special acts have been passed by the General Court to regulate the local affairs of the city of Boston alone. Such is the natural result of Commonwealth *v.* Plaisted.[1] Ch. 178, Acts of 1885, limits the power of Boston to incur municipal indebtedness "exclusive of the state tax and of the sum required by law to be raised on account of the city debt," to nine dollars on every one thousand dollars of its taxable property, but the power of the General Court to incur indebtedness for the city is unlimited. The "debt limit," so much discussed now in the Boston newspapers, is a contrivance to prevent the city from borrowing much itself, while it leaves the state free to borrow as much as it pleases for the city, the city being bound to pay the debt without being consulted in its creation, and being unable to limit it. The result is, that a large part of the city debt is now managed entirely at the state house, the city being called upon by warrant to pay what the state orders. Tammany could not do better than this, and Boston is no longer really under a republican form of government.

"Beginning January 1, 1887, the borrowing capacity of the city of Boston was limited to two per cent. of the average valuation of the preceding five years, less all abatements. On February 1 of the present year the actual net debt of the city, exclusive of the water debt, was $50,897,319.02. Adding the water debt, it was $58,333,369.16, and with the Metropolitan water debt it was nearly $80,000,000. According to the law of 1885, covering the two per cent. limit, leaving out the water debt, the net debt of the city should be only $20,000,000.

"It is figured that the debt is nearly eight per cent. instead of two per cent. City officials say that this increase of the city's indebtedness is because of legislative enactments authorizing the borrowing of money outside of the debt limit.

"This year's borrowing capacity of the city within the debt limit of two per cent. for the current year is $1,525,255.40, exclusive of the loans already authorized not yet issued of $1,800,000."

Such is the result of the denial of home rule to the city of Boston.

The People *v.* Porter:[2] In this case it was held that Art. 6, § 19, and other articles and amendments of the state constitution clearly recognize counties, towns, cities, and villages as the units

[1] 148 Mass. 375 (1889).

[2] 90 N. Y. 68 (1882).

of division of the state, and therefore ch. 415, Laws of 1881, "to establish the Niagara Police District," a new district, carved out of other territory, and not bounded by county, town, city, or village lines, with a local police court therein erected, is unconstitutional.

The disregard of the salutary principle of local self-rule by the legislature, and the reluctance of the courts of New York to uphold it (until a late day), have resulted in the most unwarranted interference in this state by its General Assembly in the local affairs of its towns. Thus the report of the Fassett Committee of the New York Senate of 1890, appointed to investigate the subject of municipal government in New York, shows that within the six years, 1884 to 1889 inclusive, the legislature passed 1284 acts relative to the thirty cities in the state. Of these 390 acts related to the city of New York only. In 1886 280 of the 681 acts passed interfered directly with the affairs of some particular county, city, town, or village, specifically named.

In 1876 the state of New York appointed commissioners "to devise a plan for the government of cities in the state of New York." Bryce[1] says:—

"The commission of which Mr. W. M. Evarts (now senator from New York) was chairman included some of the ablest men in the state, and its report, presented 6th March, 1877, may be said to have become classical."

This commission found that one of the causes of the misgovernment of American cities is the assumption by the legislature of the direct control of local affairs; and they recommended restriction of the power of the legislature to interfere by special legislation with municipal governments or the conduct of municipal affairs.

Were our courts better informed by a bar better versed in knowledge of state constitutional law, they would more often come to the rescue of a people threatened with the loss of one of their most important rights, — the right to local self-government.

The constitution of California of 1849 provided:[2] "The legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable throughout the state."

Yet, so little was the system understood in this state, that in 1874, in *Ex parte* Wall,[3] it is stated, "The legislature of California has never established a 'system of town governments.' The word 'town' is nowhere used in the statutes in the sense in which it is

[1] 1 Am. Comm. 609. [2] Art. XI. sec. 4. [3] 48 Cal. 277, at 320.

employed in the constitution. . . . No township governments have been established."

Such is the result of an attempt at the wholesale introduction of a system for those "not to the manner born." It furnishes illustration of the truth that institutions of government are the result of growth, not of manufacture: —

"The system of town governments, as it existed in New York prior to 1846, is fully explained in the eleventh chapter of the first part of the revised statutes of 1827–8. There, as in New England, the towns possessed certain of the faculties of a body corporate; could sue and be sued, hold lands, and make contracts necessary to the exercise of their corporate powers. In New York, as elsewhere, the citizens of towns chose certain town officers, and when assembled as a deliberative body (justices of the peace presiding) made 'prudential rules and regulations' with respect to local matters committed to their discretion. In some other states, this power would seem to have been vested in boards of trustees, who constituted the local parliaments." [1]

The People *v.* Batchellor: [2] At p. 140 the court falls into approval of the doctrine then current: that municipal corporations are creatures of the legislature and subject to its will. It admits, however, that there are limits to the exercise of this power, and holds, therefore, that such a corporation cannot be compelled against its will to become a stockholder in a railroad corporation, as directed by a statute.

The ancient right of each municipality to appoint its own officers for the preservation of order and the enforcement of law has also been jealously guarded in England by a statute that but embodies what has always been the law and the custom. Ch. 76, 5 & 6 Wm. IV., 1835, entitled "An Act to provide for the Regulation of Municipal Corporations in England and Wales," provides (sec. lxxvi.) that the council for each borough shall appoint a watch committee which shall appoint constables "for preserving the Peace by Day and by Night, and preventing Robberies and other Felonies and apprehending Offenders against the Peace." This act well illustrates the pains our English cousins have been at to preserve their ancient right to local self-government. It has been reserved for us, under a system of national and state governments more democratic in form than the English system, to introduce the undemocratic and oligarchic principle that towns and cities have no rights the legislature is bound to respect.

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[1] By McKinstry, J., in *Ex parte* Wall, 48 Cal. 277, at 320 (1874).

[2] 53 N. Y. 128 (1873).

The right to local self-government is still preserved in England, without the safeguards of a written constitution; but too many of the courts of this country would say this right is non-existent unless it is to be found expressly stated in the written constitution. It would seem, therefore, that not even yet has the old Teutonic idea of power delegated by the people to their own representatives taken deep enough root in the political soil of the states of our Union. Of course the political machines everywhere, irrespective of party, favor the old Roman idea of power vested in the governing body, which, at the dictation of the boss, delegates power to lieutenants and prefects not accountable to the people. Unless the courts take stand against this assumption, the right to local self-government is in a fair way to be gradually lost.

"In considering state constitutions, we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed." [1]

Goodnow [2] well shows how "the legislature has easily confused its powers of authorization with its powers of compulsion. It has come to regulate itself local matters, and has encroached upon the domain of municipal home rule. This encroachment upon the field of local self-government has been productive of greater evil than its attempted encroachment on the domain of the rights of private individuals. For while the courts could protect individual private rights, they have been unable to protect the rights of local government of municipal corporations."

It is submitted, however, that this has been largely from mistaken ideas as to their powers in such cases.

Not a session of the legislature of any of the larger states of our Union is held but what some new measure is introduced that would interfere with local self-government in some town or city. The New York newspapers informed us of several bills introduced last winter providing for the appointment of more boards of police commissioners in several cities that had hitherto escaped this burden. The assembly of the city of New York has been considering a bill this winter providing for the appointment of a commission to revise the city charter. It was vetoed by Mayor Van Wyck for reasons that must commend themselves to every well-wisher to local self-

[1] Cooley, Const. Lims. 6th ed. 49.

[2] Mun. Home Rule, 54.

government, however we may otherwise differ from the mayor, his party, and their methods. In his veto message, he says: —

"This commission is to be appointed, not by any of the officers of the city which is to be governed by the charter to be prepared, but by the governor of the state. . . . What the welfare of the city demands is not constant charter revision, but freedom from legislative interference with the administration of its affairs and the recognition of its constitutional right of self-government."

The act was passed over the mayor's veto, was passed also by the state legislature, and under its authority the governor has appointed the commission. The people of New York do not see the impropriety of a charter for a city drawn up by a commission not appointed by its own citizens, and over which its citizens have no control, and the results of whose labors, no matter how good, are subject to the caprice of a foreign body, the state legislature. Thus, under a mock form of republican government, an oligarchical form of government is established, and the courts, our last resort, have, in many instances, helped on, by erroneous decisions, the abolition of our liberties.

It will be noticed that many of the cases cited involved the question of the validity of the appointment of police commissioners by the governor for certain cities. It will be claimed that, even admitting the right to local self-government, police officers are doing a state duty, and therefore, being state officers and not town or city officers, the state has the right to appoint them. Therefore, it is claimed, the legislature, in authorizing the governor to appoint a board of police for a city, is not interfering with the right to local self-government. To this argument there is more than one reply. It is not denied that the legislature can appoint state police. It is claimed, however, that when it does so it must pay them with state money. It has no right to appropriate town money to pay state expenses. Of course it has power to treat all towns alike, to make them the agent to collect the state tax, levying the same percentage on the tax collected in each town for the state treasury. This, however, is very different from a special levy on one city by taking all its property used for police purposes and making the city pay salaries of police commissioners appointed by the governor, over whom, and their police officers, the city has no control. This is substantially a taking of the town or city property without due process of law, and without compensation.

But, apart from this objection, there is no agreement among the authorities that police officers are state and not local officers.

The following cases hold that they are state officers: People *v.* Draper,[1] Mayor, etc. of Baltimore *v.* Howard,[2] Cobb *v.* City of Portland,[3] People *v.* Hurlbut,[4] Chicago *v.* Wright,[5] Burch *v.* Hardwich,[6] State *v.* Hunter,[7] Commonwealth *v.* Plaisted,[8] and lastly, Kelley Adr. *v.* Cook[9] (a case in which this point was conceded by the plaintiff (p. 30), and no authorities are cited. It is at variance with the history of the subject in Rhode Island, as has been shown in these articles, and may yet return to plague its inventors. In view of the history to the contrary in this state, the fact that it was taken for granted without argument and without the support of authorities, it cannot be considered as entitled to weight).

The following cases hold that they are not state officers: Speed & Worthington *v.* Crawford,[10] Allor *v.* Wayne[11] (a thoroughly well considered case, in which the brief for the relator is of great interest, and contributed materially to the decision reached), City of Evansville *v.* The State,[12] Rathbone *v.* Wirth,[13] State *v.* Moores.[14]

In Ohio *v.* Covington[15] it was held: "Many duties of policemen relate to matters of general concern, and have always been regulated by the general laws of the state."

In Robertson *v.* Baxter[16] we find it stated: "But constables, while, from time immemorial, elected by the people, have never been regarded as agents of their locality. They are ministers of public justice, and in that capacity are state ministerial officers, with some powers strictly local and some not local. They have nothing to do with the transaction of local business, and are, in many respects, on the same footing with justices and judges, who are chosen by local electors, but who serve the state in enforcing the general laws, which are always of general concern."[17]

With such confusion and conflict of view among the authorities, it is impossible to rest the right of the legislature to interfere in local self-administration of police powers upon the ground that it is the exercise of a state power and not of a town power.

Provisions that eligibility to office shall depend upon membership in certain political parties, and other similar limitations, have

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[1] 15 N. Y. 344, at 362 and 373 (1857).
[2] 15 Md. 376 (1859).
[3] 55 Me. 381 (1868).
[4] 24 Mich. 42, at 81–83 (1871).
[5] 69 Ill. 318, at 326 (1873).
[6] 30 Gratt. (Va.) 24 (1878).
[7] 38 Ks. 578, at 581 (1888).
[8] 148 Mass. 375 (1889).
[9] 21 R. I. part 1–29 (1898).
[10] 3 Met. (Ky.) 207, at 210 (1860).
[11] 43 Mich. 76 (1880).
[12] 118 Ind. 426 (1888).
[13] 150 N. Y. 459 (1896).
[14] 55 Neb. 480 (1898).
[15] 29 Ohio 102, at 114 (1876).
[16] 57 Mich. 127, at 131 (1888).
[17] See, also, Metropolitan Police *v.* Board of Auditors, 68 Mich. 576, at 588, 589 (1888).

repeatedly been held to be unconstitutional, because they prescribe a test for holding office.[1]

That notwithstanding a direction that the officers to be appointed shall belong to two political parties, the act is constitutional, and this direction may be disregarded, see People *v.* Hurlbut,[2] State *v.* Seavey [3] (overruled in State *v.* Moores [4]), and Commonwealth *v.* Plaisted.[5]

This word "test" has a definite legal meaning, as exemplified in the English Test Acts, in which religious opinion was made a reason for exclusion from office. Every one would admit that no such acts would be valid in the United States. They are equally invalid if, instead of religious opinion, political opinion be made the test for eligibility to office. It would be the grant of a special privilege to a certain class of citizens.

But if these acts could be made constitutional by merely leaving out this feature, they would lose greatly in attractiveness to politicians seeking a fat job. This explains why this test is inserted in these acts. Under pretence of non-partisanship, the two principal political machines seek to exclude the possibility of appointment of any one belonging to any other party, so that they may divide the offices as a reward for party services among their own members, as the bosses may agree. If this feature is struck out, the machine is not so solicitous for the passage of these bills.

The following well considered cases, denying the power of the legislature to interfere in municipalities with their local self-government, deserve careful study: The State *v.* Denny,[6] City of Evansville *v.* The State,[7] The State *v.* Denny,[8] Rathbone *v.* Wirth,[9] State *v.* Moores.[10] It will be noticed that the later cases sustain the principles sought to be brought out in these papers, and are entitled to more weight than the many cases to the contrary that are largely *obiter dicta.* They are also later in date, and, it is confidently submitted, are the better statement of the law of to-day.

No country can live that destroys local self-government. The weak spot in our system is the exaltation of state rights at the expense of town rights and local home rule. Towns are looked

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[1] Mayor *v.* Board of Police, 15 Md. 376, at 484 (1859); Atty.-Gen. *v.* Councilmen of Detroit, 58 Mich. 213 (1885); City of Evansville *v.* State, 118 Ind. 426 (1888); The State *v.* Denny, Ib. 449; Rathbone *v.* Wirth, 150 N. Y. 459 (1896).

[2] 24 Mich. 44, at 93 (1871).

[3] 22 Neb. 454, at 466 (1887).

[4] 55 Neb. 480 (1898).

[5] 148 Mass. 386 (1889).

[6] 118 Ind. 382 (1888).

[7] Ib. 426 (1888).

[8] Ib. 449 (1888).

[9] 150 N. Y. 459 (1896).

[10] 55 Neb. 480 (1898).

upon by legislatures and courts ignorant of local constitutional history as being completely under the power of the legislature. The relation of states to the United States is all right; the relation of the towns to the state is all wrong, if the views of some courts are to prevail. It is the denial of this right of local self-government that has enabled Tweed and his successors to govern cities through state legislation. Hence the numerous acts making cities pay salaries to officers appointed by the state who are under no responsibility to the cities whose affairs they manage and whose money they disburse. To remedy this, the principle should be established that the authority that pays shall appoint and control in all local matters. "The cradle of liberty" is not in our state or nation, but in our towns and cities. Here is found the primary school for the training of American citizens. The ignoring of this fundamental truth is directly responsible for nearly all our municipal ills and for the decline in American citizenship.

To help in restoring a better state of things, every new constitution should, in its bill of rights, recognize local self-government and prohibit special legislation. It should state expressly the right of the legislature to pass general laws, and the right to mould and direct the powers, duties, and obligations of towns and cities only upon application of the particular municipality affected, and even then subject to ratification by its own voters.

Already, in sixteen state constitutions, the legislature is forbidden to regulate by any special act the internal affairs of its certain municipalities. These are: California, Art. IV. sec. 25, par. 9; Colorado, Art. IV. sec. 25; Idaho, Art. III. sec. 19; Illinois, Art. IV. sec. 22; Indiana, Art. IV. sec. 22; Missouri, Art. IV. sec. 53; Montana, Art. VI. sec. 26; Nebraska, Art. III. sec. 15; New Jersey, Art. IV. sec. 20; North Dakota, Art. IV. sec. 7, par. 11; Pennsylvania, Art. III. sec. 7; South Dakota, Art. III. sec. 23, par. 4; Texas, Art. III. sec. 56; West Virginia, Art. VI. sec. 39; and Wyoming, Art. III. sec. 27.

In many states the constitution assures the right to local self-government, sometimes by providing that the legislature shall not pass any special act creating local offices or commissions to regulate local affairs, sometimes providing that the voters may elect all or certain local officers. These are: California, Art. IV. sec. 25, par. 9, and Art. XI. sec. 11; Colorado, Art. V. sec. 35; Idaho, Art. III. sec. 19, and Art. XV.–III. sec. 19; Illinois, Art. IV. sec. 22, and Art. X. secs. 6 and 8; Indiana, Art. IV. sec. 22; Art. VI. secs. 1-3; Kansas, Art. IX.; Kentucky, secs. 97–99 and

160; Maryland, Art. IV. sec. 44, and Art. VII. sec. 1; Michigan, Art. X. sec. 3, XI.–XV. sec. 14; Minnesota, Art. XI. sec. 4; Mississippi, Art. VI. secs. 170 and 171; Montana, Art. V. secs. 26 and 36; Art. XVI. secs. 4–6; Nebraska, Art. III. sec. 15, and Art. X. sec. 4; Nevada, Art. IV. secs. 20 and 26; New Jersey, Art. IV. sec. 7, par. 11; New York, Art. X. secs. 1 and 2; North Dakota, Art. II. sec. 69, par. 32; Ohio, Art. X.; Pennsylvania, Art. III. secs. 7 and 20; Art. V. sec. 11; Arts. XIV., XV. sec. 2; South Dakota, Art. IX.; Texas, Art. III. sec. 56; Virginia, Art. VI. secs. 15–20; Washington, Art. XI. sec. 5; West Virginia, Art. IX.; Wyoming, Art. III. sec. 27; Art. XII. sec. 5.

The constitutions of Missouri, California, and Washington contain provisions under which towns and cities may make and alter their own charters by conventions of their own delegates, subject of course to the constitution and general laws of the state. The experience of these three states proves the scheme to be a good one.

In 1876 the city of St. Louis framed its own charter through a convention of thirteen of its freeholders elected by its own voters, as authorized by the state constitution. This charter has been recognized generally by the authorities on city government as the best American model.[1]

In Ewing *v.* Oblitzelle,[2] it was held that there is no constitutional objection to allowing the voters of a city to frame and adopt their own charter of government, if authorized by the state constitution to do so.

In 1889 Kansas City, Missouri, framed and adopted its own charter in the same way, the result being satisfactory.

The system having worked well in Missouri, when the constitutional convention of California met in 1879, it was proposed to incorporate it in the new constitution. The politicians opposed it, professing great fear lest San Francisco, the only city in the state containing the requisite population of 100,000, should break loose from the rest of the state and set up a free government of its own. "This is the boldest kind of an attempt at secession," said one speaker. The opposition was so great that the friends of the measure were compelled to accept an amendment that such a charter, after acceptance by the voters of the city, must be approved also by the legislature, — to be approved or rejected as a whole, however, without alteration or amendment. For years the active operation

[1] Oberholzer, The Referendum in America, 91. [2] 85 Mo. 64 (1884).

of "the city hall gang," a potent source of corruption in San Francisco, succeeded in defeating every charter drawn under this clause of the constitution of the state. At last, however, a majority voted to approve a charter thus framed by its own convention. The system meeting with popular approval throughout the state, the constitution was amended to allow all cities of more than 10,000 inhabitants to frame their own charters. Los Angeles was the first to frame its own charter under this amendment. It was approved by its own voters and by the legislature, and is now in successful operation.

The cities of Oakland, Stockton, San Diego, and Sacramento have also framed their own charters. They have all proved successful.

The system has worked so well that in 1890, by constitutional amendment, the right was extended to any city containing over 3500 inhabitants. In 1892 another constitutional amendment provided that charters thus framed shall become the organic law of the cities adopting them and supersede all laws inconsistent therewith, thus depriving the legislature of the power to interfere with them, even by any general law.

The constitution of Washington of 1890 contains similar provisions. Those who fear this extension of the principle that the people can govern themselves should read the debates of this convention and follow the subsequent history of this clause. Seattle has a charter thus framed, and the city comptroller writes: "The plan is acknowledged to be better than depending upon the legislature."

In 1890 Tacoma also adopted a charter of its own making. The mayor writes: "The new is felt to be superior to the old method."

Oberholzer concludes his examination of this subject: "For the good of the cities themselves, and likewise for the good of the states, it is necessary that our large cities should be free cities."

The charter of San Francisco, recently adopted, framed in the same way, by a convention of its own citizens, said to be the best city charter yet framed, is now attracting the attention of students of municipal government throughout the country. The charter of the city of New York, framed through the action of the General Assembly and not of its own citizens, is already an admitted failure, and is already to be revised in the same objectionable way it was framed, while the charters of these western cities, framed by conventions of their own citizens, are admitted successes.

These illustrations show that the people themselves in these new

communities are taking steps to correct the evils resulting from the denial by legislatures and courts of the right to local self-government.

The following necessarily brief summary of the origin of some of the English settlements on the American coast is enough to show what little title the settlers derived from England, and that the governmental powers they exercised, as exigency required, were, in the main, self-instituted powers. The facts are drawn largely from Fiske's excellent books.

Early in the seventeenth century the colonization of the North American coast became part of the avowed policy of the English government. In 1606 a joint stock company was formed for the establishment of two colonies in North America. This company obtained a grant from the crown of the territory between the thirty-fourth and forty-fourth degrees of north latitude, from the Atlantic to the Pacific oceans. This was divided between the two colonies, the territory from the thirty-fourth to the thirty-eighth degree being bestowed on the South Virginia Company, having its headquarters in London. The territory from the forty-first to the forty-fifth degree was bestowed on the North Virginia Company, with headquarters in Plymouth, Devonshire. (The name of Virginia was then loosely applied to the whole Atlantic coast north of Florida.) The intervening territory between the thirty-eighth and forty-first degrees of north latitude was to go to whichever company should first plant a self-supporting colony. The local government of each colony was to be intrusted to a council resident in America, while general supervision was to be exercised by a council resident in England, the king to appoint the council.

Under this scheme the settlement of Jamestown, Virginia, was begun in 1607. An attempt was made the same year by the North Virginia or Plymouth Company to make a settlement at the mouth of the Kennebec River, under the lead of George Popham, a kinsman of Sir John Popham, the chief justice of England. It was a failure, through ignorance of the climate, and this spread the opinion in England that North Virginia was uninhabitable on account of the extreme cold.

That adventurous spirit, John Smith, who had taken a leading part in establishing the settlement at Jamestown, came over with two ships in 1614, explored the coast from the Penobscot River to Cape Cod, and rechristened it New England. The map he made, with the names he placed on it, at the suggestion of Prince Charles, shows the importance of his explorations. The names of Cape

Elizabeth, Cape Ann, Charles River, and Plymouth still remain where Smith placed them. The name of North Virginia disappeared, and that of New England has happily taken its place.

In 1620 Sir Ferdinando Gorges obtained a new charter of King James for the Plymouth Company, making it independent of the London or South Virginia, or, as it became known, the Virginia Company. It included all land between the fortieth and forty-eighth degrees of north latitude, to forty patentees, to be known as the Council for New England. Shakespeare's friend, the Earl of Southampton, was a member. It was under this patent that all subsequent grants of land were made, regardless of other grants and of the actual occupation by Holland and France. Such was the reckless habit of the times. It was from this company the Merchant Adventurers, associated with the Mayflower Pilgrims, obtained their new patent in 1621, but without any intention of landing at what afterwards became New Plymouth. Their landing where they did, being accidental, was made without the knowledge of the patentees in England.

In 1622 the Council of the Plymouth Company granted to Sir Ferdinando Gorges and Captain John Mason, two of their own number, all the lands between the Merrimac and the Sagadahoc rivers,[1] but this grant was never executed. In 1629 Mason procured a new patent from the Plymouth Council. It included land that John Wheelwright and his associates had already settled upon and bought of the Indians (Exeter). Belknap, in his History of New Hampshire (p. 8), cannot account for this grant, as it included land already included in the supposed grant of 1622. The failure to execute that grant explains why a new grant was made. They obtained a further grant in 1631, and in 1634 they divided what they supposed was their property, Mason taking his share on the western side of the Piscataqua (now New Hampshire), and Gorges taking his on the eastern side (now Maine).

Settlements having been made in New Hampshire after the grant to Gorges and Mason in 1622 that was never executed, and before the grant to them in 1629, the settlers refused to admit any title except their own that they had derived from the Indians. The four original settlements or towns of New Hampshire, — Exeter, Dover, Portsmouth, and Hampton, — out of which many other towns were subsequently carved, all with the same rights and powers these original towns enjoyed, were thus colonies or

[1] 1 Haz. Col. 103, 118.

towns with self-originating compacts of government like the towns in Rhode Island. The first chapter of the History of Exeter, by Charles H. Bell, is entitled "Exeter as an Independent Republic," which is suggestive. He says that this town was the third settled in New Hampshire, the first one being at Strawberry Bank, afterwards Portsmouth, the second one being at Dover. Hampton was the last one settled. If it be claimed that all this land was included in the king's grant to the Plymouth Council, the answer is that the old Virginia Company in England complained to Parliament of the grant to the Plymouth Council as a monopoly, and in 1635 the Plymouth Council resigned their charter in consequence of this opposition, and also because of the loss of favor of these Puritan colonies with the High Church party. This left all these settlers in New Hampshire and Maine without title to the land from any English authority, and without authority to act as a government, except by agreement among themselves. The state, therefore, did not create or form these towns; they formed themselves. Accordingly, in 1639, the settlers in Exeter agreed upon association for governmental purposes. Their agreement was drawn up by their minister and leader, John Wheelwright, a brother-in-law of the celebrated Mrs. Anne Hutchinson. It was as follows:

"Whereas it has pleased the lord to move the heart of our Dread Soveraigne Charles, by the grace of god King of England, Scotland, France & Ireland, to grant licence & liberty to sundry of his subjects to plant themselves in the Westerne partes of America: Wee his loyall subjects, brethren of the church of Exceter, situate & lying upon the river of Piscataquacke wth other inhabitants there considering wth our selves the holy will of god and our owne necessity that we should not live wthout wholsome lawes & civil government amongst us, of w^{h} we are altogether destitute, doe in the name of Christ & in the sight of god combine ourselves together to erect and set up amongst us such government as shall be to our best discerning, agreeable to the will of god, professing ourselves subjects to our Soveraigne Lord King Charles according to the libertys of our English Colony of the Massachusets & binding ourselves solemneley by the grace & helpe of Christ & in his name & feare to submit our selves to such godly & christian laws as are established in the Realme of England to our best knowledge, & to all other lawes w^{h} shall upon good grounds be made & inacted amongst us. according to god y^{t} we may live quietly & peaceablely together in all godlyness and honesty —

"Mon— 5th, d. 4th 1639"

This was called "The Combination." In the Bicentennial Address of Hon. Jeremiah Smith in 1838 he said: "It is the only

act of incorporation our town has ever had. We are a self-created body politic."

This combination was reënacted in 1640 with an explanatory preamble; p. 18 Bell says:—

"The executive and judicial functions were vested in a board of three magistrates or elders, of whom the chief was styled Ruler. They were chosen by the whole body of the freemen, who were the electors and legislators, their enactments, however, requiring the approval of the Ruler. An inhabitant had to be admitted a freeman before he could enjoy the privileges of an elector; and there is one instance of a freeman being deprived of his privileges as such, by reason of misconduct."

Bell goes on to say that the people of Dover and Portsmouth, having no power of government delegated to them by the crown, but finding it necessary to have some form, combined themselves each into a body politic after the example of their neighbors at Exeter. In 1640 the freemen of Dover agreed to submit themselves to the laws of England, and to such others as should be enacted by a majority of their number, until the royal pleasure should be known. There were thus four separate governments in existence, all founded on their own voluntary agreements. They joined in granting jurisdiction to Massachusetts in 1641 upon condition they should have the same liberties the people had in Massachusetts, and should have their own court of justice. Massachusetts accepted these terms, agreeing they should be exempt from all public charge except what should arise among themselves or for their own peculiar benefit; that is to say, they were still to be allowed to assess, collect, and disburse their own taxes, and were not to pay any tax to Massachusetts. In 1642 their deputies were exempted from a test of church membership, due presumably to the fact that so many of them were of the church of England. April 8, 1644, the freemen of Exeter chose three of their number "to make town rates, to distrain for all town debts; to pay the town's debts out of the town's treasury, or to make rates for it; to look to the execution of all town orders; to grant and lay out lots, provided they be not above twenty acres; to receive into the town as inhabitants, or to keep out, such as they in their wisdom think meet."

There always had been a party disaffected to the union with Massachusetts. Supported by royal commissioners from England sent to examine and report upon colonial matters, a petition was sent to England complaining of the usurpation of Massachusetts,

and praying to be released from their tyranny. The heirs of Mason continued also to assert their title. In 1677 the matter was referred to the lords chief justices of the King's Bench and Common Pleas, who reported to the king that they could give no opinion as to the right of soil in the provinces of New Hampshire and Maine, not having the proper parties before them, it appearing that not the Massachusetts colony, but the terre-tenants, had the right of soil, and yet were not summoned to defend their titles. As to Mason's right of government within the soil he claimed, their lordships, and indeed his own counsel, agreed he had none, the great council of Plymouth under whom he claimed having no power to transfer government to any. It was determined that the four towns of Portsmouth, Dover, Exeter, and Hampton were out of the bounds of Massachusetts.[1] This report was accepted and confirmed by the king in council in 1677. Here is judicial determination that these four towns that afterwards became New Hampshire were settled independently, were governed under self-instituted powers only (and under a title to the soil derived from the Indians). Evidently New Hampshire did not make them; by their subsequent union they made New Hampshire.

The attorney-general admitted that Mason's title could be tried only where he claimed his land was. To try his title it became necessary to establish a new jurisdiction. The colony of Massachusetts was therefore informed of the king's intention to separate New Hampshire from Massachusetts, revoking all commissions Massachusetts had granted there. In 1679 a commission passed the great seal for the government of New Hampshire, inhibiting the jurisdiction hitherto exercised by Massachusetts over the towns of Portsmouth, Dover, Exeter, and Hampton, and all other lands extending from three miles to the north of the river Merrimac to the province of Maine, constituting a president and council to govern the province. These, and three of the inhabitants to be by them elected, were to constitute a court of record, with a right of appeal to the king in council. Liberty of conscience was granted to all Protestants and a local assembly.

This necessarily brief account is enough to show the fallacy of the position taken by so many courts that towns are the creatures of the legislature and subject to their will. Here we find another state in which this theory will not hold with the facts.

Amasa M. Eaton.

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[1] Belknap, Hist. of N. H. 87; 1 Hutch. 317.